No. 74-1220

In the Supreme Court of the United States

OCTOBER TERM, 1974

DAVID A. WOOLDRIDGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on (1) two counts of selling unregistered securities in interstate commerce, in violation of 15 U.S.C. 77e(a) and (c) and 15 U.S.C. 77x; (2) three counts of making fraudulent interstate sales of securities, in violation of 15 U.S.C. 77q(a) and 15 U.S.C. 77x; (3) one count of using the mail to defraud, in violation of 18 U.S.C. 1341; and (4) one count of conspiring to commit those substantive offenses, in violation of 18 U.S.C. 371. Petitioner was sentenced to concurrent terms of two years' imprisonment on each of the substantive counts and to four years' imprisonment on the conspiracy count, to run consecutively to the sentences on the substantive counts, and was fined $10,000. The court of appeals affirmed (Pet. App. A).

The evidence, which is summarized in the opinion of the court of appeals (Pet. App. A, pp. 1-2), showed that petitioner and two co-defendants, Eisenberg and Manning, participated in a scheme to defraud involving the sale of unregistered securites of several corporations that possessed few assets and were as a practical matter mere corporate shells. The unregistered securities were sold on the basis of false and misleading statements concerning the actual assets and prospects of the corporations.

1. Petitioner contends (Pet. 6-10) that the trial court abused its discretion in refusing to grant a new trial after two jurors reported misconduct on the part of the forelady.

Following the jury verdicts, the defense moved for a new trial on the basis of affidavits of two jurors alleging that the forelady had independently examined the law involved in this case in a securities law textbook (Tr. 4803, 4893-4894). The court held a hearing and allowed counsel to submit questions to be propounded by the court (Tr. 4849-4856). The forelady denied the allegation (Tr. 4803, 4893-4894). However, the forelady did testify that during the trial she had insisted to the bailiff and members of the jury that in her experience it was impossible to obtain loans to purchase securities (Pet. App. C, pp. 10-12). After the bailiff told her she was wrong, she called a bank, obtained information on loans, and subsequently told the bailiff and the other jurors that she had erred and that it was possible to borrow funds for the purchase of securities (Pet. App. C, pp. 11-12). Both jurors who testified about the forelady's conversation with the bailiff and her later mention of the conversation during jury deliberations insisted that their decisions as to the guilt or innocence of petitioner were wholly unaffected by the forelady's comments (Pet. App. A, pp. 7-8).

The trial court found that the forelady had not looked up the law as alleged by the three jurors; that even if she had, it did not amount to misconduct; and that if it did amount to misconduct, it was not prejudicial (Pet. App. D, pp. 16-17). It also found that the conversation between the bailiff and forelady did not prejudice the defendants (Pet. App. D, p. 15).[1] Under these circumstances, the trial court did not abuse its discretion in refusing a new trial. *Holt* v. *United States*, 218 U.S. 245; *United States* v. *Brumbaugh*, 471 F. 2d 1128 (C.A. 6), certiorari denied, 412 U.S. 918.

The trial court's determinations not to question all the jurors and not to allow further independent interrogation of the jurors were within its discretion. *Smith* v. *Cupp*, 457 F. 2d 1098, 1100 (C.A. 9); *United States* v. *Handy*, 454 F.2d 885, 889 (C.A. 9); *Miller* v. *United States*, 403 F. 2d 77 (C.A. 2); *Bryson* v. *United States*, 238 F. 2d 657, 665 (C.A. 9).[2]

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[1]In view of the nonprejudicial nature of any extrajudicial information imparted by the forelady to her fellow jurors, there was no need to interrogate each member of the jury to determine whether his or her decision had been affected. Indeed, the substance of that information—that the defendant's borrowing of funds in connection with the purchase and sale of securities was not presumptively unlawful—was favorable to the defense. *Miller* v. *United States*, 403 F. 2d 77 (C.A. 2), upon which petitioner relies (Pet. 9), is not to the contrary.

[2]Petitioner's reliance upon *Gold* v. *United States*, 352 U.S. 985, *Remmer* v. *United States*, 347 U.S. 227, and *Mattox* v. *United States*, 146 U.S. 140, is misplaced. Each of those cases differs in important respects from the instant case. In *Gold*, an FBI agent had visited three members of the jury during a trial on the falsity of a non-communist affidavit and asked if they had received any

2. Petitioner also contends (Pet. 10-13) that the court erred in giving the instruction sanctioned in *Pinkerton* v. *United States*, 328 U.S. 640, which allows a jury to find a conspirator liable for the foreseeable acts of a co-conspirator committed in furtherance of the conspiracy.[3] However,

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propaganda literature; the Court reversed and remanded for a new trial because of the official intrusion into the privacy of the jury. Similarly, in *Remmer* an FBI agent had interrogated a juror during the trial concerning a bribe suggestion that the juror reported having received from someone purporting to represent the defendant; the court determined that the government should not have subjected the juror to such extraneous influence. In *Mattox*, the bailiff had told two jurors: "After you fellows get through with this case it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him.* * * This is the third fellow [the defendant] has killed." 146 U.S. at 142. This case does not involve any similar extraneous influence.

[3]The court's instruction (25 Tr. 4618, 4620) followed *Pinkerton* as limited by *Levine* v. *United States*, 383 U.S. 265, 266:

> In connection with the counts I have mentioned, Two, Three, Six, Seven, Nine, Twelve, Fourteen, Sixteen and Eighteen, if you find that the particular act was committed as charged by at least one of the actors charged, then you may find any of the other defendants charged in that count as being guilty of the same crime on one of two alternative theories which I will explain in a minute.
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> * * * * *
>
> Now, the second alternative theory is this—it is called the Pinkerton theory, and I think that word has been referred to in argument. If you find that the specific act was committed by one or more of the actors as charged and that the act was done in furtherance of a conspiracy—this assumes now that you have heretofore found a conspiracy to act as charged in Count One—and if you find that the defendant in question was one of the co-conspirators at the time that the actor committed the specific act and might reasonably have foreseen that such act would be done by another member of the conspiracy, then you may find that such other non-actor defendant was guilty of the crime charged.

the court of appeals correctly determined that "[a] careful review of the evidence indicates that there was substantial evidence to support the jury's verdict on the general conspiracy charge and * * * [that] the evidence of [petitioner's] fraudulent conduct is overwhelming" (Pet. App. A, p. 4), and that in view of the "strong evidence of a single, unified conspiracy, the instruction of the judge was proper" (*ibid.*). See *Blumenthal* v. *United States*, 332 U.S. 539; *United States* v. *King*, 472 F.2d 1 (C.A. 9), certiorari denied *sub nom. Butler* v. *United States*, 414 U.S. 864.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[4]This case is not like *United States* v. *Falcone*, 311 U.S. 205, upon which petitioner relies (Pet. 13). In *Falcone*, this Court held only that one who had no knowledge of the conspiracy could not be charged with the acts of the conspirators. That ruling has no application to one who, like petitioner, has been determined to be a member of the conspiracy.